

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

KEITH WATERS,

Plaintiff,

v.

9:15-cv-805
(TJM/CFH)

SGT. A. MELENDEZ, et al.,

Defendants.

Thomas J. McAvoy, SR. U.S.D.J.

DECISION and ORDER

The Court referred this action alleging constitutional violations by prison officers, brought pursuant to 42 U.S.C. § 1983, to the Hon. Christian F. Hummel, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Rule 72.3(d) of the Local Rules of the Northern District of New York. Plaintiff alleges that the Defendants are liable to him for violating his due process rights in a disciplinary proceeding. The Report-Recommendation, dated January 31, 2017, recommended that the Court deny Defendants' motion to dismiss the Complaint as duplicative of another action, and that the motion of certain Defendants to dismiss the action for failure to state a claim should be granted.

Neither side filed objections to the Report-Recommendation and the time for filing such objections has passed. After examining the record, this Court has determined that the Report-Recommendation is not subject to attack for plain error or manifest injustice

and the Court will adopt the Report-Recommendation.

Subsequent to the filing of the Report-Recommendation, Plaintiff filed a motion for default judgment against Defendant Cecil Muschett. See dkt. # 66. Plaintiff contends that Muschett has been served the Amended Complaint, has failed to answer, and has thus defaulted. The Court notes that Defendant Muschett joined in the motion to dismiss presently before the Court. See dkt. # 53. Federal Rule of Civil Procedure 12(a)(1)(A)(i) mandates that a Defendant serve a responsive pleading “within 21 days after being served with the summons and complaint.” FED. R. CIV. P. 12(a)(1)(A)(i). The docket establishes that the Court extended the time to answer the Amended Complaint for Defendant Muschett until June 30, 2016, and that Muschett filed a motion to dismiss on June 21, 2016. See dkt. #s 48, 53. Muschett therefore served a responsive pleading within the time mandated by the Court and default is not available. Moreover, as Muschett filed a motion to dismiss which was denied, his “responsive pleading must be served within 14 days after notice of the court’s action[.]” FED. R. CIV. P. 12(a)(4)(A). Plaintiff’s motion for default judgment will be denied.

Accordingly:

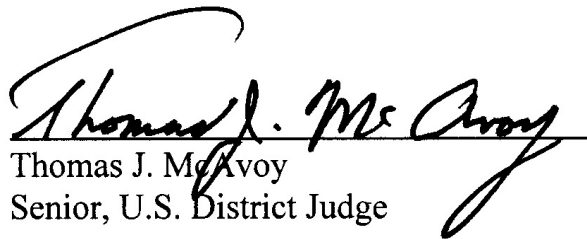
The Report-Recommendation, dkt. # 63, is hereby ADOPTED. The Defendants’ motion to dismiss, dkt. # 53, is hereby GRANTED IN PART and DENIED IN PART, as follows:

1. The motion to dismiss pursuant to Fed. R. Civ. P. 12(c) is GRANTED with respect to Defendants Gutwein and Prack and DENIED with respect to Defendants Melendez, Muschett, Bedard, Lamphere, and Rivera; and
2. The motion to dismiss pursuant to Fed. R. Civ. P. (12)(b)(6) is hereby

GRANTED with respect to Defendants Bedard, Lamphere, and Rivera.
Plaintiff's motion for default judgment against Defendant Muschett, dkt. # 66, is hereby
DENIED.

IT IS SO ORDERED

Dated: March 13, 2017


Thomas J. McAvoy
Senior, U.S. District Judge